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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN KIRKSEY,

Defendant and Appellant.

B236176

(Los Angeles County
Super. Ct. No. MA050534)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Kathleen Blanchard, Judge. Affirmed.

D. Inder Comar, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D.
Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Karen Kirksey was convicted by a jury of various felonies, including first degree burglary and assault with a firearm. On appeal, defendant contends the trial court sentenced her in violation of Penal Code section 654.¹ She also asks that we review the in camera proceedings conducted by the trial court to determine whether it properly concluded there was no discoverable material to which she was legally entitled under Evidence Code sections 1043 and 1045 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

Defendant was charged by information with six felony counts involving her husband Curtis Kirksey and his girlfriend Rolanda Jones: Count 1, first degree burglary of Jones's residence with a person present (§ 459); count 2, assault on Kirksey with a firearm (§ 245, subd. (a)(2)); count 3, discharge of a firearm with gross negligence (§ 246.3, subd. (a)); count 4, corporal injury to a spouse (§ 273.5, subd. (a)); count 5, felony vandalism of Kirksey's truck (§ 594, subd. (a)); and count 6, assault on Jones with a firearm (§ 245, subd. (a)(2)). The information specially alleged defendant personally used a firearm in committing the offenses (§ 12022.5, subd. (a), counts 1, 2, 4, and 6) and inflicted great bodily injury on Kirksey (§ 12022.7, subd. (e), counts 2 and 4).² Defendant pleaded not guilty and denied the special allegations.

2. Pretrial Discovery (Pitchess) Motion

Defendant filed a *Pitchess* motion for pretrial discovery of information in the personnel records of Los Angeles County Sheriff's Deputies Moreno, Rose, Scalecht and Rodriguez concerning any complaints or allegations involving dishonesty. In written opposition, the Los Angeles County Sheriff's Department argued three of the deputies

¹ Statutory references are to the Penal Code, unless otherwise indicated.

² Before trial, the trial court dismissed an additional allegation that defendant had inflicted great bodily injury on Jones (count 6).

were either not present or not involved in the reported assaults, defendant's arrest and subsequent booking into jail. The fourth deputy, Moreno, was involved but only after the purported assaults. He interviewed the victims and defendant after giving *Miranda* admonitions. (*Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].)

The trial court found good cause as to Deputy Moreno and granted the pretrial discovery motion in part.³ Following its in camera review with the custodian of records, the court determined there was no discoverable material to be provided to the defense.

3. Summary of Evidence Presented at Trial

Defendant and Kirksey had been married for 18 years and lived in Palmdale. Without defendant's knowledge, in 2009, Kirksey became romantically involved with Jones, a friend from church.

On September 27, 2010, Kirksey went to visit Jones at her house. In the evening the two of them began watching television in the bedroom. They were lying on the bed fully clothed. At the time Jones's children were home, including 18-year-old Joseph, who was in the garage playing video games, and Jones's two-year old daughter, who was in a toddler bed next to Jones.

At around 8:30 p.m. Joseph noticed a car drive up and park on the wrong side of the street. Minutes later, defendant lifted the garage door and entered, accompanied by her daughter and female friend. The three women walked aggressively as if they were angry or frustrated. With defendant in the lead, they headed for the door to the house.

³ There is no reporter's transcript in the record of the hearing on the discovery motion. The minute order of both the hearing and the in camera review indicate only: "Matter is called for *Pitchess* motion and granted. In camera hearing is held. The court finds that there are no discoverable items to be turned over." The reporter's transcript of the in camera review shows discovery was limited to complaints of dishonesty involving Deputy Moreno. It is therefore reasonable to assume the trial court agreed with the opposition that only *Pitchess* material concerning deputy Moreno was discoverable.

Joseph asked why they were there, but defendant did not respond. Joseph saw a gun in defendant's hand.⁴

Defendant walked into Jones's bedroom with her companions and began yelling at Kirksey. Raising her gun, defendant fired one shot into the ceiling, prompting Jones to immediately leave the bed to stand over her daughter. Defendant began hitting Kirksey in the head with the gun. Rather than fight back, Kirksey attempted to leave the bed, but he was restrained by defendant's companions. At one point, defendant turned to Jones and threatened to shoot her, and the two women began wrestling for the gun. Jones managed to grab the gun and to point it towards the floor. Defendant went back to hitting Kirksey in the head, this time using a piggy bank and other items in the bedroom.

Jones took the gun and fled to the home of a neighbor, who telephoned police. In the meantime, defendant and her companions emerged from the house. Defendant retrieved a tire iron from her car and used it to smash the windows of Kirksey's truck, which was parked in front of Jones's house. Defendant and her companions then left in her car.

Police arrived and Kirksey was transported to a hospital, where he was treated for blunt head trauma and multiple skull fractures. A metal plate was surgically implanted in his skull. Jones's neighbor turned the gun over to police.

Defendant testified in her defense that on the evening of September 27, 2010, she found some sexually explicit photographs of Kirksey and Jones in her husband's attaché case. Defendant was not angry, but she wanted to talk to Kirksey and believed he was with Jones at her house. Defendant's daughter and a friend offered to accompany defendant to Jones's house. According to defendant, although Kirksey kept a handgun in their house, defendant was afraid of guns. Neither she nor either of her two companions had a gun that evening.

Defendant and her companions arrived at Jones's house and went inside through the open garage. When defendant reached the bedroom, she saw Kirskey and Jones in

⁴ Kirksey kept an unloaded handgun between the mattresses of his bed. He stored the ammunition in his dresser.

bed. Kirksey jumped up, cursed and grabbed defendant. The two of them fought, pushing, pulling and hitting each other. Seeing what she thought was a brick in Kirskey's hand, defendant grasped an object and struck Kirskey, before demanding he let her go. Defendant was concerned about protecting herself. She then heard something break that sounded like a pop. Defendant denied pointing a gun at Jones, but acknowledged the two of them struggled over a gun. Defendant admitted breaking all the windows of Kirksey's truck because she was upset.

Defendant's friend and daughter each testified, largely corroborating defendant's testimony.

4. Verdict and Sentencing

The jury found defendant guilty as charged and found true the special allegations.

At the sentencing hearing, the trial court made the following comments before imposing a consecutive term on each count with the exception of count 4, corporal injury to a spouse. "And under the circumstances as to each of those crimes, quite frankly defendant had an opportunity to reflect on her actions, to stop those actions before further crimes were committed, but she didn't. She chose to commit each of these crimes. And as far as the other counts are concerned, I believe consecutive sentences are appropriate under the law."

The trial court sentenced defendant to an aggregate state prison term of 14 years 4 months, consisting of: Count 2, eight years for aggravated assault on Kirksey (the two year lower term, plus three years each for the firearm use and great bodily injury enhancements); count 1, a consecutive term of 32 months for first degree burglary (one-third the four-year middle term, plus 16 months for the firearm use enhancement); count 3, a consecutive term of eight months for discharge of a firearm with gross negligence; count 5, a consecutive term of eight months for felony vandalism of Kirksey's truck; and count 6, a consecutive 28 month term for aggravated assault on Jones (one-third the three-year middle term) plus 16 months for the firearm-use enhancement). The trial court imposed and stayed its sentences for corporal injury to a spouse and the firearm use and great bodily injury enhancements.

DISCUSSION

1. *Defendant Was Not Sentenced in Violation of Section 654*

Defendant contends the trial court violated the rule against multiple punishment for an indivisible course of criminal conduct, when it sentenced her for both the burglary and the aggravated assault on Jones.

On appeal, we review the trial court's findings regarding the divisibility of a course of criminal conduct under the substantial evidence standard. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) "The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial." (*People v. Saffle* (1992) 4 Cal.App.4th 434, 438.)

Section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507; *People v. Latimer* (1993) 5 Cal.4th 1203, 1216.)⁵ "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Rodriguez*, at p. 507; accord, *People v. Lewis* (2008) 43 Cal.4th 415, 519.) Where the commission of one offense is merely "a means toward the objective of the commission of the other," section 654 prohibits separate punishments for the two offenses. (*People v. Britt* (2004) 32 Cal.4th 944, 953.) Here, because the burglary of Jones residence was the means of perpetuating the assaults on Jones and Kirksey, the criminal acts were indivisible, incident to defendant's single objective of attacking both victims. (See, e.g, *People v.*

⁵ Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Radil (1977) 76 Cal.App.3d 702, 713 [burglary with intent to commit assault]; *People v. McElrath* (1985) 175 Cal.App.3d 178, 191 [burglary with intent to commit sexual assaults].) Indeed, nothing suggests defendant initially intended to do violence to one victim, and then, after entry or in the middle of one assault, formed a separate intent to do violence to the other victim. Ordinarily, section 654 would have barred punishment for both the burglary of Jones's residence and the assault on Jones with a firearm, requiring the trial court to stay the shorter potential sentence on the aggravated assault with the firearm-use enhancement.

Nonetheless, where multiple victims of violent crime are involved, even indivisible criminal acts may be punished separately. (*People v. Miller* (1977) 18 Cal.3d 873, 885-886 (*Miller*), disapproved of on another ground in *People v. Oates* (2004) 32 Cal.4th 1048, 1067, fn. 8 [§ 654 does not bar punishment for armed robbery of clerk and burglary with great bodily injury against security guard of same store.]; accord *People v. Jones* (2012) 54 Cal.4th 350, 362.) Separate punishment is permitted because a defendant has greater culpability when endangering more than one person. (*Miller, supra*, at p. 885 [“As the purpose of section 654 is ‘to insure that defendant’s punishment will be commensurate with his criminal liability,’ when he ‘commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons,’ his greater culpability precludes application of section 654”].)

The multiple victim exception applies “so long as each violent offense involves at least one different victim.”⁶ (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1631; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1784-1785; *Miller, supra*, 18 Cal.3d at p. 886, fn. 11.) Defendant’s burglary of Jones’s residence resulted in acts of violence against at least three people: Kirksey and Jones were named as victims in charges of assault with a firearm and, by finding defendant guilty of these two offenses, the jury accounted for the

⁶ There is no dispute the burglary of Jones’s residence was a violent offense for purposes of the multiple victim exception because it was “committed in conjunction with an act of violence qualifying as an enhancement,” personal use of a firearm (§ 12022.5, subd. (a)). (*People v. Hall* (2000) 83 Cal.App.4th 1084, 1090-1091.)

acts of violence against each of them. Jones's two-year-old daughter was also present during the assaults, however, the act of violence against her was not accounted for because she was not identified as a victim of an offense in the information or in a verdict.

In *People v. Centers* (1999) 73 Cal.App.4th 84, 89 (*Centers*), one of three occupants of a residence was a victim of both a burglary and a kidnapping. The appellate court addressed whether the multiple victim exception to section 654 allowed a separate sentence for burglary even if the information did not name the victims of the burglary.⁷ (*Id.* at p. 99.) In concluding the defendant could be sentenced for both the burglary and the kidnapping, the court reasoned the multiple victim exception applied, regardless of whether the identities of those victims had been pleaded, because there was substantial evidence that at least one other occupant was not also a victim of the kidnapping. (*Id.* at pp. 101-102.)

As in *Centers*, the trial court's implied finding in this case of multiple victims is supported by substantial evidence. Although Jones's daughter was not a named victim of the burglary, she constituted a separate victim of this violent offense. She lived in the residence and was in close proximity to defendant's violent attacks on Jones and Kirksey. The daughter's status, as a victim of the burglary but not of a charged assault, in turn, triggered the multiple victim exception and permitted the trial court to impose a separate sentence for burglary.

⁷ In response to our request, the parties submitted supplemental briefing on this issue in the context of this case.

*2. The Trial Court Did Not Abuse Its Discretion in Finding No Discoverable
Pitchess Material*

Pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, defendant requested we examine the transcript of the in camera hearing after the trial court determined defendant had demonstrated good cause to discover *Pitchess* material with respect to deputy Moreno pertaining to allegations of dishonesty. We have reviewed the sealed record of the proceedings, which adequately describes the documents reviewed, and conclude the trial court satisfied the minimum requirements in determining whether there was discoverable information; no abuse of discretion occurred. (*Mooc*, at p. 1229.)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.